IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:09/09/2004

CORAM

THE HON'BLE MR.JUSTICE R.BALASUBRAMANIAN
and
THE HON'BLE MR.JUSTICE N.KANNADASAN

C.A.NO.1167 OF 2001
1.Kannaiyan
2.Anbarasan
3.Balamurali @ Balamurugan
4.Venkatesan ..Appellants

-Vs-

State represented by
Inspector of Police
Thalaignayar
Crime No.22/2000 ..Respondent

Prayer: Criminal appeal against the judgment, conviction and sentence of life imprisonment dated 22.11.2001 passed against A1 to A4 for an offence under section 302 read with section 34 I.P.C and sentence of one year rigorous imprisonment to A4 under section 324 I.P.C by the learned Principal Sessions Judge, Nagapattinam.

!For Appellants : Mr.V.Gopinath, SC for
: Mr.A.Kalaivanan
^For Respondent : Mr.E.Raja, APP

:JUDGMENT

(Judgment of the court was delivered by
Justice R.Balasubramanian)

A1 to A4 in S.C.No.111/2001 on the file of the Court of Sessions, Nagapattinam are the appellants in this appeal. All of them were charged for an offence under section 302 read with section 34 I.P.C. In addition to the above, A4 was also charged for an offence under section 307 I.P.C for making an attempt on the life of P.W.1. The learned Sessions Judge convicted all the accused under the first charge referred to above and sentenced them to undergo imprisonment for life together with a fine of Rs.1,000/- each, carrying a default sentence. However, A4 was acquitted of the offence under section 307 I.P.C and instead, he stands convicted for an offence under section 324 I.P.C and sentenced to a fine of Rs.1,000/-, carrying a default sentence. It is that conviction which is in challenge in this appeal. Heard Mr. V.Gopinath learned senior counsel appearing for the appellants and Mr.E.Raja learned

Additional Public Prosecutor appearing for the State.

2. The occurrence is shown to have taken place at about 3.00 p.m on 08.01.2000, during which, one Mathivanan, who is stated to have been attacked by A1 to A4, succumbed later on to the injuries on 22.01.20 00 and in the course of the same transaction, P.W.1 is also shown to have been attacked by A4. To sustain their case, the prosecution examined P.Ws.1 to 3 as eye witnesses to the occurrence, besides medical and other official witnesses. The case of the prosecution as spoken to by P.W.1 is as follows:
"A1 is her father-in-law. A2 is A1's brother-in-law. A3 and A4 are the sons of A1. She is the wife of the deceased. There was a property dispute between the accused on the one hand and her husband. A panchayat was convened in regard thereto on the day of the occurrence, which was attended to by her husband. He was returning home. En-route, he was way-laid by all the accused and they attacked him, which she witnessed. They attacked her husband with sticks and suluki. A1 and A2 attacked her husband on his head and hands with suluki. A2 also attacked her husband on his head and hands. A3 and A4 attacked her husband on his head with a wooden log. She ran towards her husband and she was also beaten. A4 attacked her on her head and hands with suluki. Her husband fell down and all the accused ran away. P.W.2, a local villager, took her and her husband to the Government Head Quarters Hospital at Nagapattinam, where they were admitted as in-patients for treatment. On the third day, her husband was transferred for better treatment to the Government Head Quarters Hospital at Thanjavur and thirteen days after the date of occurrence, her husband died."

3. P.W.1 identified the weapons of offence used by the accused.
P.W.7 is the Casualty Medical Officer in the Government Head Quarters Hospital at Nagapattinam. At about 4.30 p.m on 08.01.2000, injured Mathivanan/since deceased was brought before him by P.W.2 and the injured told him that at about 3.00 p.m on that day, five persons attacked him. P.W.7 noticed the injured smelling arrack. He found on him various injuries as noted in Ex.P.6/accident register and they are as follows:

"1) Diffusion left fore arm.
2) Contusion 12 cm x 2 cm left proximal part fore arm (L)
3) Punctured injury + cm x + lower part of left arm lateral aspect
4) Contusion 8 cm x 6 cm right arm
5) Incised injury 4 cm x , cm left side of the occipital
6) Punctured injury + x , right arm lower part lateral aspect
X-Ray left fore arm, Right arm - Lat"

He also examined P.W.1, who was brought before him by P.W.2, at about 4.40 p.m on the same day and she informed him that she was attacked by five known persons with a stick at about 3.00 p.m on 08.01.2000. On examining her, he found on her the following symptoms:

"1.Incised injuries 5 cm x 1 cm above occiput
2.Contusion 8 cm x 4 cm left fore arm

3. Diffused left fore arm"

Ex.P.7 is the accident register and Ex.P.8 is the wound certificate. The Doctor is of the opinion that the injuries noticed by him on injured Mathivanan/since deceased and P.W.1 could have been caused in the manner and at the time alleged. In Ex.P.8, injury No.3 found on P.W.1 is described as grievous. (At this stage, this court is informed by the learned senior counsel that as the X-Ray taken for this injury had not been marked and therefore, the learned trial Judge was inclined to convict A4 only for the offence under section 324 I.P.C and that finding had become final).

4. P.W.10 was the Head Constable in the Investigating Police Station during the relevant time. At about 4.45 p.m on 08.01.2000, he received information from the Nagapattinam Government Hospital police outpost about this incident; he reached the hospital at 6.00 p.m and collected Exs.P.11 and P.12 namely, the hospital intimation regarding injured Mathivanan and P.W.1. He examined Mathivanan; recorded his statement and took his left thumb impression in it. Ex.P.13 is the said statement. He came back to the police station and registered it in Crime No.22/2000 for offences under sections 323 and 324 I.P.C. Ex.P.14 is the printed first information report prepared by him. He sent the material records to the court as well as to the higher officials. On the same day at 6.00 p.m., he examined A1 in the hospital itself (he was there as an in-patient) and recorded his statement. He registered that complaint in his police station Crime No.21/2000 for offences under sections 294-B and 323 I.P.C. He examined P.Ws.2, 3, 4 and others and recorded their statements. He went to the scene of occurrence and in the presence of P.W.4 and another, prepared Ex.P.1, the observation mahazar. Then he prepared Ex.P.15, the rough sketch. As injured Mathivanan was not in a position to speak on 09.01.2000, he could not record his statement again. He

arrested A1, A2 and A4 on 21.01.2000 and sent them for judicial remand. He received an information from the hospital that injured Mathivanan died on 21.01.2000 and therefore handed over the case diary to the Investigating Officer. Ex.P.10 is the death intimation.

5. P.W.12 is the Investigating Officer in this case. On receipt of Ex.P.10, the death intimation, from the police constable given by the Government Head Quarters Hospital at Thanjavur, he went to the police station at 10.30 a.m on 22.01.2000 and altered the section of offence into one under section 302 I.P.C. He prepared Ex.P.17, the altered printed first information report and sent the same to the court as well as to the higher officials. Then he reached the mortuary in the hospital at Thanjavur and prepared Ex.P.18, the observation mahazar, in the presence of P.Ws.2 and 3. He examined P.Ws. 1, 2, 3 and others and recorded their statements. From 11.30 a.m on that day, he conducted inquest over the dead body in the presence of panchayatdars and witnesses and prepared Ex.P.19, the inquest report. He examined further witnesses and recorded their statements. On prior information, he arrested A1, A2 and A3 on 27.01.000 in the presence of P.Ws.5 and 6 and examined them. A1, at that time, gave a confession statement, the admissible portion of which is marked as Ex.P.20 in this case. Pursuant to

Ex.P.20, M.Os.1 to 4 came to be recovered under Ex.P.1 attested by witnesses. He reached the police station with the material objects and the accused and sent them for judicial remand. He went to the scene of occurrence on 27.01.2000 and prepared Exs.P.22 and P.23, the observation mahazar and rough sketch respectively. He examined further witnesses and recorded their statements.

6. P.W.2 would depose that "he saw all the accused chasing Mathivanan/since deceased and he also followed them. Near the house of Mathivanan, all the accused attacked him with suluki and wooden log. A1 was armed with suluki and he is not aware as to the nature of weapon in the hands of the other accused. P.W.1 was there and she was beaten by A4. Mathivanan/since deceased fell down and all the accused ran away. He took both the injured to the Government Hospital at Nagapattinam and admitted them as in-patients. He also accompanied Mathivanan when he was transferred from the Government Hospital at Nagapattinam to the Government Hospital at Thanjavur. Mathivanan died thirteen days after the incident." P.W.3 is the younger brother of the deceased and he would also claim to have seen the entire occurrence. He would also state that P.W.2 took both the injured to the Government Hospital at Nagapattinam for treatment and that his brother died fifteen days after the occurrence. P.W.4 witnessed the preparation of Ex.P.1 , the observation mahazar. P.Ws.5 and 6, who were examined to speak about the arrest of the accused and recording their statements under section 27 of the Indian Evidence Act, turned hostile. As suggested by P.W.7, injured Mathivanan was transferred to the Government Head Quarters Hospital at Thanjavur. P.W.11, during the relevant time, was the Medical Officer in the Government Medical College Hospital at Thanjavur. On 10.01.2000 at about 2.00 p.m., injured Mathivanan, who was transferred from the Government Hospital at Nagapattinam, was brought before him for further treatment. He examined him immediately and found the injured unconscious. As the injured had head injuries, steps were taken to take X-Rays. Mathivanan was admitted as an in-patient. Ex.P.16 is the accident register given by him. P.W.9 is another Medical Officer in the Government Hospital at Thanjavur. He would state that he received the information namely, Mathivanan was struggling for his life in the neuro ward at about 00.40 hours on 22.01 .2000 and he immediately went to attend him. He would also state that despite his best efforts, Mathivanan did not survive and he died. He sent Ex.P.10/death intimation to the police. P.W.12 continued the investigation further, by examining P.Ws.7, 8, 9 and 11 and recorded their statements. He sent the case properties to the court with Ex.P.24/requisition to subject the same for chemical examination. As an enclosure to Ex.P.25/court's letter, the material objects were sent to the laboratory and Ex.P.26 is the chemical examiner's report. P. W.12 was succeeded by P.W.13 and he, after verifying the investigation already done by the earlier Investigating Officer, filed the final report before court on 07.08.2000 against the accused for offences under sections 302 read with section 34 I.P.C., 326 I.P.C and 327 I.P.C. When the accused were questioned under section 313 of the Code of Criminal Procedure on the basis of the incriminating materials made available against them, they denied each and every circumstance put up against them as false and contrary to facts. No witnesses were examined on their side. But however, the accused marked Ex.D.1 through P.W.7 in his cross examination and marked Ex.D.2 through P.W.10 during

his cross examination.

7. The question that falls for decision is whether the conviction of the accused for the offences referred to above is supported by any legal material? Mr.V.Gopinath, the learned senior counsel appearing for the appellants, would submit the following points:

a) The place of occurrence is shifted to the advantage of the prosecution.
b) P.Ws.2 and 3 could not have witnessed the occurrence at all and therefore their evidence should be disbelieved.
c) P.W.2 had admitted that A1 had sustained injuries in the same transaction in which Mathivanan/since deceased came to sustain the injuries. This means, there was a quarrel between the two groups. If that is so, then the case of each individual must be considered on their own individual acts.
d) When there is a quarrel, there is no question of sharing the common intention by one accused with the other accused and it stands eliminated.
e) The prosecution had failed to place before the court any medical evidence to show what is the treatment given to Mathivanan/since deceased between the date of the incident and the date of his death. This vitiates the entire prosecution case and in any event, in the absence of medical evidence, even the individual, assuming he caused the fatal attack, cannot be found guilty for an offence under section 302 I.P.C but only for a lesser offence. For this purpose, the learned senior counsel relied upon a Division Bench judgment of this court in the case reported in 2001-1 L.W.Crl.Pg.354 (Nammalwar Vs. State, etc.)
f) There is discrepancy in the evidence of the witnesses as to the weapons used by each of the accused vis-a-vis the deceased as well as P.W.1 and the benefit of the same should be given to the accused.

We heard the learned Additional Public Prosecutor on all these points. The learned Additional Public Prosecutor, relying upon the judgment reported in 1999 Volume I S.C.C. Pg.120, would submit that when there is medical evidence to show that the death was caused by septicemia, which was due to head injury and the said injury was sufficient in the ordinary course of nature to cause death, the conviction under section 302 I.P.C would be proper.

8. We applied our mind to the various materials on record. On account of the injuries sustained on 08.01.000, the injured (Mathivanan) died on 22.01.2000. However, when he was alive, he was examined by P.W.10, the Head Constable, and his statement was recorded, in which, his left thumb impression was obtained. Since he died after giving that statement, that statement becomes admissible in evidence as a dying declaration. We perused Ex.P.13 and the oral evidence of P.W.10. Though P.W.10 had not taken the precaution of having Ex.P.13 attested by the Medical Officer on duty at that time namely, at the time of recording, in our opinion, that lapse by itself, on the totality of the circumstances surrounding the recording of Ex.P.13, would not enable this court to doubt the very recording of Ex.P.13. It may be noticed here that, on Ex.P.13, a crime was registered only for offences under sections 323 and 324 I.P.C. Though it is expected of a police officer to send the material records namely, the complaint and the first information report,

to the court at the earliest point of time to avoid any criticism on the truth of it, yet we find that Exs.P.13 and P.14 had reached the court only at 1.00 p.m on 12.01.2000. It is no doubt true that there is a lapse on the part of the Investigating Police Station in not sending these material records in time to the court. But however, having regard to the nature of the offence that stood registered on that day and the death of the injured itself taking place only on 22.01.2000, we are not inclined to attach much importance to the delay caused in sending Exs.P.13 and P.14 to the court. In other words, in our considered opinion, the delay in sending Exs.P.1 3 and P.!4 to the court is

not going to discredit the case of the prosecution, if it is otherwise trustworthy. Therefore we are inclined to accept the contents of Ex.P.13 as a true version.

9. In the background of our reflection of mind on Ex.P.13, we proceeded to analyse the arguments advanced by the learned senior counsel appearing for the appellants. It is no doubt true that in Ex.P.13 it is stated that the attack took place in the house of the victim. But the uniform evidence of P.Ws.1, 2 and 3 is that, as the victim was on his way back home, he was way-laid and attacked. P.W.1 would admit in her evidence that the place of attack is hardly 50 feet away from her house. Therefore, the evidence of P.W.1 as referred to above and the contents of Ex.P.13 namely, the injured had returned to his house, cannot be necessarily taken to mean that the occurrence had taken place only inside the house and not anywhere else. The expression used by the injured in Ex.P.13 that after panchayat, he had come back to his house, does not rule out the position that he was on his way back to his house and the place of occurrence is shown to be so near to his house. From a perusal of Ex.P.15/rough sketch, it is seen that from the place of attack, the house of the victim is on the southern side and in between, there are no other houses. Therefore, we do not find much of a difference regarding the place of occurrence as set out in Ex.P.13 and the oral evidence of P.Ws.1, 2, and 3 and accordingly, we reject the argument of the learned senior counsel for the appellants that there is a serious doubt as to where exactly the occurrence took place. Now let us find out whether P.Ws.2 and 3 could be eye witnesses at all to the occurrence? We have already concluded that Ex.P.13 is a true version. In Ex.P.13, the name of P.W.3 is not mentioned as an eye witness at all. We are fully aware that a mere omission to mention the name of any person as an eye witness in the earliest information lodged by itself would not mean that persons other than whose names are mentioned in the complaint could not be examined as eye witnesses. It all depends upon the facts of each case and the observing capacity of the individual, who lodges the information. But the facts in this case are slightly disturbing us i.e., absence of the name of P.W.3 in Ex.P.13 as an eye witness could be viewed seriously or not? P.W.3 is none else than the younger brother of the deceased in this case and brother-in-law of P.W.1. One can understand if there is lack of power to observe a stranger eye witnesses in the scene of occurrence. But at the same time, it must be remembered that the presence of a thick relative like a brother can never be lost sight of by the injured in this case. We find that P.W.3 had not even chosen to go to the hospital along with his elder brother (deceased) and sister-in-law (P.W.1), when they were taken by P.W.2 to the hospital. Therefore the inaction on the

part of P.W.3 in not accompanying his injured brother and sister-in-law to the hospital, coupled with the omission of his name in Ex.P.13 as an eye witness present at the scene of occurrence, does not totally rule out the possibility of P.W.3 not being present at the scene of occurrence. His evidence before court is also not convincing as to whether he could have witnessed the occurrence at all. He would state in his evidence that the occurrence went on for almost an hour and about 100 to 150 people gathered at the scene. P.W.1, in contrast, would state that the entire occurrence was over in ten minutes. In her evidence, she does not mention about the presence of a large body of people at the scene of occurrence. P.W.2 is totally silent on both the aspects. Going by the overall materials noted above, we have a lingering doubt as to whether P.W.3 was present at the scene and witnessed the incident itself. Therefore, we are inclined to give that benefit of doubt in favour of the accused. So, we hold that P.W.3 could not have been present at the scene of occurrence at all and we have to necessarily eliminate his evidence from consideration.

10. Then, we examined the case of the prosecution that P.W.2 is also an eye witness to the occurrence. The fact remains established that P.W.2 took the injured/P.W.1 and Mathivanan/since deceased to the hospital. Exs.P.6 and P.7, the accident registers issued by P.W.7 for the deceased and P.W.1 respectively do show that P.W.2 brought both of them to the hospital. P.W.7 in his oral evidence would also state that P.W.2 brought P.W.1 and the deceased before him. Therefore there cannot be any doubt that P.W.2 accompanied Mathivanan/since deceased and P.W.1 to the hospital. But still, the question is whether he witnessed the occurrence or he came to the scene of occurrence later and then took the injured to the hospital? P.W.2 appears to be related to P.W.1, the deceased and P.W.3. In Ex.P.13, it is not clearly mentioned that P.W.2 is an eye witness to the occurrence. What all is said in Ex.P.13 is that, this incident is known to P.W.2 and Anbazhagan (not examined). In our considered opinion, during the transit time namely, from the place of occurrence to the Government Hospital at Nagapattinam, there is every possibility of both the injured telling P.W.2 about the occurrence and therefore, when in Ex.P.13 it is stated that the occurrence is known to P.W.2 and another, it can be read to mean that he knew it from the injured. In other words, the wording in Ex.P.13 would be that P.W.2 and the other had witnessed the occurrence. We are strengthened to say this, since if really P.W.2 had witnessed the occurrence, then P.W.1 would not have failed to mention in her evidence that P.W.2 witnessed the occurrence. But on the other hand, from a perusal of her entire evidence, we find that she no-where mentions the presence of P.W.2 anywhere near the scene. In other words, there is total omission in her evidence about the presence of P.W.2 at the scene, either nearer or at a far off place, from where, he could have seen the occurrence. We have already discarded the evidence of P.W.3 on the ground that he could not be an eye witness. Even assuming for a moment without admitting that he can also be treated as such, even then, we find that P.W.3 also does not speak about the presence of P.W.2 at the scene of occurrence (We have applied our mind to the evidence of P.W.3 only for the limited purpose of finding out whether P.W.2 could have been present at the scene or not). Therefore, we have no hesitation at all to conclude once again that it would not be safe to act upon the oral evidence of P.W.2 as an eye witness to the

occurrence, since his presence is open to a serious doubt.

11. This leaves the court with the oral evidence of P.W.1 and the dying declaration/Ex.P.13. P.W.1 is an injured witness. P.W.1 suffering an injury in the incident is found mentioned in Ex.P.13. Therefore there cannot be any doubt that the transaction in which Mathivanan came to sustain the injuries, to which he succumbed later on, his wife (P.W.1) also had sustained injuries. Therefore even at this stage we conclude that P.W.1's presence at the scene cannot be disputed at all. It is a well settled position in law that a man, making a statement in anticipation of his death, may not lie and normally the statement made by him is accepted by the court in it's letter and spirit. It is also a well settled position in law that witnesses may lie but not documents. Therefore it is our duty to find out whether the evidence of P.W.1 is in accordance with the terms of Ex.P.13? In Ex.P.1 3, the injured/Mathivanan/since deceased had attributed three overt acts to different accused as far as he is concerned. According to Ex.P.13, A1, with M.O.1/suluki, stabbed him on his right fore arm. A2, with a stick, attacked on the back side of his head and A3, with a stick, beat him on his right fore arm. Therefore in Ex.P.13, three individual overt acts are attributed to the respective accused as referred to above and the seat of injury is also correspondingly given. It may be noticed that in Ex.P.13 no overt act at all is attributed to A4 vis-a-vis the injured/Mathivanan/since deceased. The only overt act attributed to A4 in Ex.P.13 is that he attacked P.W.1 with M.O.1 on the back side of her head, resulting in a bleeding injury and on her right and left fore arm. Ex.P.8 is the accident register relating to P.W.1. It shows that the injured has one injury in the occipital region and two injuries on the left fore arm. Therefore, the overt acts attributed to A4 in Ex.P.13 more or less gets support from Exs. P.7 and P.8 issued by P.W.7 to P.W.1 at the time of examining her. Now, if we compare the overt acts attributed to the various accused in Ex.P.13 with the oral evidence of P.W.1, it is clear to our mind that her evidence runs contra to the overt acts attributed to the various accused in Ex.P.13. She would state in her evidence as follows:

"A1, with a weapon like M.O.1, hit on her husband's head and two hands; A2, with a weapon like M.O.1, attacked on her husband's head and hands; A3 and A4, with sticks in their hands, hit on her husband's head."

These overt acts, spoken to by P.W.1, as already stated by us, are directly in contravention to the overt acts attributed by the injured/ Mathivanan/since deceased in Ex.P.13. Therefore, we are of the opinion that P.W.1 is definitely trying to improve the case before court, so that the entire family of A1 could be brought before court and punished and they would be away from the family of P.W.1 for the rest of the time to come. Under these circumstances, we are not inclined to attach much importance to the oral evidence of P.W.1 as to the various overt acts she had attributed in her evidence to the various accused. In our opinion, the overt acts attributed to the accused by P.W.1 before court, wherever it finds corroboration in Ex.P.13 alone should be accepted and that too, the weapon stated to have been used by the various accused in Ex.P.13 alone would prevail over the weapons stated to have been used by the accused as spoken to by P.W.1 in her evidence. In her evidence P.W.1 would state that A2 attacked her husband with suluki on his

head and hands. But in Ex.P.13 it is stated that A2 attacked Mathivanan/since deceased with a wooden log on his head. Going by the consistent fact namely, A2 attacked on the head of P.W.1's husband, we are inclined to hold that A2 had only used a stick in causing a hurt on the head of her husband (Mathivanan/since deceased). Her oral evidence before court that A1 also attacked her husband on his head and hands with a weapon like M.O.1 stands contradicted in Ex.P.13, in which, we find that A1 attacked with M.O.1 on the right fore arm of her husband and to this extent only, we accept the oral evidence of P.W.1. P.W.1, in her oral evidence would state that A3 and A4 attacked her husband on his head with a stick. In Ex.P.13 it is found mentioned that A3 attacked her husband on his right fore arm with a stick. There is no mention in Ex.P.13 that A3 attacked on the head of the victim. To test the veracity of the oral evidence of P.W.1 about the overt acts attributed to all the accused vis-a-vis the deceased, we perused Ex.P.6, the accident register as well as the post mortem certificate. Both the documents show that there is only one injury on the head of the victim in this case and that injury consistently stands attributed to A2 alone. Therefore we are not inclined to believe the oral evidence of P.W.1 that A4 and A3 also attacked on her husband's head with a stick. The result of our discussion based on the contents of Ex.P.13 and the oral evidence of P.W.1 is as follows:

"(a) A4, with a weapon like M.O.1, attacked P.W.1 on her head and her left and right fore arm;
(b) A2 attacked with a stick on the rear side head of the deceased in this case;
(c) A1, with a weapon like M.O.1, stabbed on the right fore arm of the deceased; and
(d) A3, with a stick, attacked on the right fore arm of the deceased."

Except to the above extent, we are not inclined to believe the prosecution case with reference to the other overt acts attributed by P.W.1 in her oral evidence.

12. The question that follows from our above conclusion is, what are the offences for which the various accused can be convicted? In other words, whether the conviction of A1 to A4 for the offence under section 302 read with section 34 I.P.C and the conviction of A4 for the offence under section 324 can be sustained? We will take up the conviction of A4 first. We have already found that A4 had caused an injury on P.W.1. Her oral evidence is in support of the prosecution case. Her oral evidence is corroborated by the medical evidence of P.W.7 and Exs.P.7 (accident register) and P.8 (wound certificate). Though Ex.P.8 shows that P.W.1 had suffered a fracture, yet the trial court had held that since X-Rays taken for that wound had not been marked, it was inclined to convict A4 only for the offence under section 324 I.P.C. Since the State had not challenged that finding, we confirm the conviction of A4 given by the trial court for the offence under section 324 I.P.C and sentenced to pay fine alone, carrying a default sentence.

13. Next, we go to the question of conviction of A1 to A4 for the offence under section 302 read with section 34 I.P.C. In this context, the argument advanced by the learned senior counsel for the appellants that there

is total absence of medical evidence as to how the injured/Mathivanan/since deceased was treated from the date of his admission in the Government Hospital at Nagapattinam till he ultimately breathed his last on 22.01.2000 in the Government Head Quarters Hospital at Thanjavur deserves acceptance, since admittedly the connecting link of medical evidence is missing in this case. P.W.7 is the Doctor in the Government Hospital at Nagapattinam, who examined Mathivanan/since deceased at 4.40 p.m on 08.01.2000. His oral evidence shows that all the injuries found by him on Mathivanan/since deceased are simple in nature. Ex.P.6 is the accident register given by him. But in Ex.P.6 he had mentioned the nature of injuries. Ex.P.6 shows that the injured was smelling alcohol. He would state that he had suggested transfer of Mathivanan/since deceased for better treatment to the Government Head Quarters Hospital at Thanjavur. P.W.11 is the next Doctor examined in this case. He was working, during the relevant time, in the Government Medical College Hospital at Thanjavur and at 2.0 0 p.m on 10.01.2000, on transfer from the Government Hospital at Nagapattinam, he admitted Mathivanan/since deceased in his hospital. He would state that as he found the patient unconscious, he took steps to take X-Rays and issued Ex.P.16, the accident register. He does not speak about the treatment given by him when the patient was under his care and caution. No other medical evidence, except that of P.W.9, is available before the injured breathed his last. At the risk of repetition, we state that P.W.11 is totally silent as to what type of treatment was given by him to Mathivanan/since deceased when he was in the Government Hospital at Thanjavur. P.W.9 in his evidence would state that he came to know immediately after the mid-night of 21.01.200 0 and the morning of 22.01.2000 (to be precise 00.40 hours) that the injured in this case is struggling for his life and therefore he reached his ward and tried to save him but yet he failed. Ex.P.10 is the death intimation. This Doctor is also totally silent as to what type of treatment was given to the injured in this case before he tried to save his life. Even P.W.7 does not speak about the nature of the treatment given to the injured/Mathivanan/since deceased when he was in the Government Hospital at Nagapattinam. Medical case sheet also is not produced. Therefore, we are inclined to hold that the evidence of P.W.7, P.W.11 and P.W.9 do not disclose what type of treatment Mathivanan/since deceased had received at the hands of the Hospital Authorities namely, in the hospital at Nagapattinam and in the hospital at Thanjavur. Then, we have the evidence of the Doctor, who did post mortem. The Doctor is P.W.8. Ex.P.9 is the post mortem report given by him. In Ex.P.9, this Doctor had given the cause of death as due to "complications of multiple injuries". In his evidence in cross, he had answered what is meant by "complications of multiple injuries" by stating "bjh[w[;W neha; kw;Wk; mj[[[ph;r;rp" corresponding to the English expression being "contagious disease and shock". Of course, after stating in his evidence in chief that the cause of death is due to the reason mentioned in Ex.P.9, P.W.9 went on to add that external injury No.2 with it's corresponding injury Nos.7 and 8 are sufficient to cause death in the ordinary course of nature. This last piece of evidence by P.W.9 about the fatal impact of injury No.2 with corresponding injury Nos.7 and 8 is not found reflected in Ex.P.9. Therefore, to our mind, it appears to be an improvement regarding the cause of death. In this context, we are inclined to refer to the judgment relied upon by the learned senior counsel for the petitioner namely, 2001-1-L.W.Crl.Pg.354 (Nammalwar Vs. State, etc.). In that case also the injured died after a lapse of time from

the date of the incident. The learned Judges held that the prosecution has a duty to examine all the Doctors, who treated the injured persons in all medico legal cases and where they could not be secured, the case sheets can be marked through available Doctors, who can testify the actual treatment. In that case also, the cause of death of the victim included complications following the injury resulting in his death after several days. Exactly, that is the cause here as well. The learned Judges in that case, on analysing the medical evidence, found that the medical evidence do not unerringly indicate that the cause of death was solely due to the injury inflicted. In the present case, we have noted that at the time of admission, Mathivanan was found to have sustained only simply injuries. Those injuries were found sutured at the time of post mortem. Who had done the surgery and who had sutured those surgical wounds, there is no evidence. No case sheet relating to the treatment given to the patient had been marked. Who are all the Doctors, who attended the patient continuously from 08.01.2000 till he breathed his last on 22.01.2000, there is no evidence. The Doctors examined in this case do not speak about any treatment at all having been given to the injured while he was either in the hospital at Nagapattinam or in the hospital at Thanjavur. Going back to the judgment referred to above, finding fault with the prosecution in not examining all the medical witnesses, the learned Judges converted the conviction from one under section 302 I.P.C into one under section 304-I I.P.C. That judgment squarely applies to the case on hand. In this context, we are inclined to refer to the case law brought to our notice by the learned Additional Public Prosecutor namely, 1999 S.C. C.Crl.Pg.120. In that decided case also, death was a few days after the incident. But however, the Supreme Court, in that case, found that the medical evidence disclosed that the death was caused by septicemia, which was due to head injury and the said injury was sufficient in the ordinary course of nature to cause death. In other words, in that case, the medical evidence shows the nature of the injury caused; the complications developed on that injury and ultimately the cause of death. Since that is lacking in the present case, we are of the most respectful opinion that the said judgment relied upon by the learned Additional Public Prosecutor for the State may not apply to the case on hand.

14. We have held that A2 had caused the single injury on the head of the deceased in this case. Therefore, no other accused is responsible for that overt act. Whether all the other accused would have shared the common intention to attack the victim, is again another point that arises for consideration. From a perusal of Ex.P.13, it is seen that the accused went to the house of the victim only to question his claim for a right to property. The word used by Mathivanan/since deceased in Ex.P.13 is as follows:

"fz;za;ad; v';fs; tPl;Lf;F te;J cdf;F vJf;Flh brhj;J vd;W brhy;yp /////"

It's English translation means, "A1 came to our house and asking me as to where do I get the property, stabbed me with M.O.1 in my right fore arm". Therefore, the idea of going to the house of the victim in this case is to question his claim or authority for a property and not with any definite intention of killing him. If really, the intention at that time in the mind of the first accused (Kannaiyan) is to kill him (Mathivanan), then he would have chosen a most vulnerable part of the anatomy of the victim in this case.

But instead, he is shown to have chosen a non-vulnerable part namely, right fore arm, in causing the injury and that too, a simple injury. In other words, in our opinion, the visit to the house of the victim in this case probably appears to cause hurt to the victim and put fear in his mind, so that he would not claim any property thereafter. In this context, the case of A1 is as follows:

P.W.7 in his evidence in cross would admit that even at 3.45 p.m on 08.01.2000, A1 in this case was admitted in the Government Hospital at Nagapattinam as an inpatient for injuries stated to have been sustained by him at about 2.00 p.m on that day at the hands of two known persons by the use of a stick. He admits Ex.D.1, the accident register given by him for A1. In Ex.D.1, P.W.7 had noticed a contusion measuring 7 cm x 5 cm left dorsal part on A1. Ex.D.1 shows that A2 accompanied him to the hospital. P.W.7 admits that. P.W.7 also admitted that A1 could have sustained the injuries at the time and in the manner alleged. P.W.10 is the Head Constable of the Investigating Police Station during the relevant time. He admits Ex.D.2 as the printed first information report prepared on the complaint given by A1 and it stands registered in Crime No.21/2000 and the deceased in this case is the accused in that crime. The crime in the murder case, as could be seen from Ex.P.14, stands registered as Crime No.22/2000 on the same day namely, 08.01.2000. P.W.10 would admit that he enquired both the crimes separately and he did not know what happened to the investigation done in Crime No.21/2000. But later on, he admits that during investigation in Crime No.21/2000, witnesses were examined and a report was filed as "mistake of fact". He would also state that only the Sub-Inspector of Police knows as to whether the referred report was served on the accused in this case or not. The referred report is admittedly not exhibited in this case. After A1 had caused the attack, A2 and A3 also had attacked Mathivanan. No words of expression have been used by A2 and A3 while they attacked the victim. Therefore, this court is not in a position to hold that, either prior to the attack of the victim or during the time when A1 attacked the victim, they ever had any intention to do away with the victim in this case. But their intention appears to be only to cause hurt to him and put fear in his mind. If that is so, then in our opinion, there is no question of sharing the common intention by the accused and each individual must be considered for his individual acts only. If we consider the individual act of the various accused in this case, then A2 alone is held responsible for the injury caused by him on the head of the injured/Mathivanan/since deceased. A1 and A3 are guilty of causing hurt (simple hurt) on the right fore arm of Mathivanan/since deceased in this case, the former using a weapon like M.O.1 and the latter using a stick. This means, all the accused are entitled to be acquitted of the offence under section 302 read with section 34 I.P.C. This does not mean that all the accused should be allowed to escape unpunished and each one's case has to be decided on the basis of their individual acts. A2 had caused the injury on the head. For want of medical evidence as noted in the earlier part of this judgment, he must be held to be aware or he must be held to have knowledge that his act is likely to result in the death of the injured. We do not find any intention on his part to cause the death of the victim in this case. Therefore the act of A2 can be brought under

section 304-II I.P.C. As far as the act of A1 and A3 are concerned, they are shown to have caused simple injuries to the victim in this case.

15. In view of our discussion as referred to above, the appeal stands disposed of as hereunder:

"All the accused are acquitted of the offence under section 302 read with section 34 I.P.C. Instead, A2 stands convicted for an offence under section 304-II I.P.C., for which he would stand sentenced to undergo rigorous imprisonment for five years together with a fine of Rs.1,000/-, carrying a default sentence of six months rigorous imprisonment. A1 and A3 are convicted under section 324 I.P.C., for which, each one of them shall stand sentenced to undergo rigorous imprisonment for two years together with a fine of Rs.1,000/- each, carrying a default sentence of three months rigorous imprisonment. The fine amount, if any, already paid shall be adjusted towards the fine amount imposed by this court now. A4's conviction for the offence under section 324 I.P.C stands confirmed. A1 and A3 are shown to be in prison from the date of the judgment of the Court of Sessions namely, 22.11.2001, which means, they would be completing three years on 22.11.2004 . Since they stand sentenced to undergo rigorous imprisonment only for a period of two years, the imprisonment already suffered by them is set off against the sentence imposed now. Therefore, A1, A3 and A4 are directed to be released forthwith.

Vsl
Index : Yes

To
1.The Principal Sessions Judge, Nagapattinam
2.The District Collector, Nagapattinam
3.The Director General of Police, Chennai
4.The Public Prosecutor, High Court, Madras
5.The Superintendent, Central Prison, Cuddalore
6.The Inspector of Police, Thalaignayar, Thiruthuraipoondi Taluk